Citation: *R.* v. *Rivest*, 2013 YKTC 53

Date: 20130628
Docket: 11-00791
11-00791A
11-00791B
11-00791C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

BRIAN DAVID RIVEST

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Gregory Dunn — Counsel for the Defence

REASONS FOR JUDGMENT

[1] What began as a routine impaired driving case has evolved into something of a comedy of errors. Four separate Informations alleging offences contrary to sections 253(1)(a) and 254 of the *Criminal Code* were drafted over a period of ten months in an effort to, in the words of the Crown, "get it right". As the final Information was filed on the eve of trial, leading to an inevitable adjournment, Mr. Rivest has brought an application for a judicial stay of proceedings alleging both an abuse of process and unreasonable delay contrary to s. 11(b) of the *Canadian Charter of Rights and Freedoms (*the *"Charter")*.

History of the Case:

[2] For the purposes of this decision, it is necessary to review, in some detail, the history of proceedings in this case, which can be summarized by date as follows:

- **January 1, 2012**: Date of the alleged offence;

- **February 13, 2012**: The first Information is sworn with count 1 alleging an offence contrary to section 253(1)(a). This count remains the same in each of the four Informations. Count 2 alleges an offence contrary to s. 254(5) which is particularized as follows:
  - On or about the 1st day of January, 2012, at or near Whitehorse, Yukon Territory, did without reasonable excuse, refuse to comply with a demand made to him by Constable WALLINGHAM, a Peace Officer, to provide then or as soon thereafter as was practicable, samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code;

- **February 21, 2012**: The second Information is sworn, amending count 2 to read:
  - On or about the 1st day of January, 2012, at or near Whitehorse, Yukon Territory, did without reasonable excuse, refuse to comply with a demand made to him by Constable WALLINGHAM, a Peace Officer, ***to provide forthwith a sample of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis of his breath to be made by means of an approved screening device*** contrary to ***Section 254(2)(b)*** of the Criminal Code; (emphasis added)

- **March 7, 2012:** First appearance, by agent. The court is advised that Mr. Dunn will be counsel, but, as he is from Calgary, he is in the process of applying to the Law Society of Yukon for a certificate of permission to act in the Yukon;

- **March 28, 2012:** Second appearance, by agent. The court is advised that the application to the Law Society is still in process and will be not be reviewed by the Law Society until April 24, 2012;

- **March 29, 2012:** The third Information is sworn. The section number is amended back to s. 254(5), but the wording remains the same as in the second Information;

- **April 25, 2012:** Third appearance, by agent. The court is advised that the Law Society will be reviewing the application for permission to act later that same day;

- **May 9, 2012:** Fourth appearance, by agent. The court is advised that Mr. Dunn has been granted a certificate of permission to act. Not guilty pleas are entered

and the matter is adjourned to fix a date for trial. The court raises a question about the three Informations before the court and the Crown advises, "I will sort this out by the next date";

- **May 18, 2012:** Fifth appearance, by agent, to fix a date for trial. The court is advised that the only date Mr. Dunn is available before March 2013 is October 12, 2012. There is no indication of the Court's earliest available date. The matter is set to October 12, 2012 for trial. The court notes the three Informations before the court and the Crown advises "I haven't had a chance to review the Information … so, I'll have trial counsel sort that out";

- **October 5, 2012:** The fourth Information is sworn, amending count 2 to read:
  - On or about the 1st day of January in the year 2012 at or near the City of Whitehorse, Yukon Territory, did without reasonable excuse ***fail or refuse*** to comply with a demand made to him by Constable WALLINGHAM, a peace officer, ***under Section 254(2)(b) of the Criminal Code*** to provide forthwith a sample of his breath, ***as in the opinion of Constable WALLINGHAM*** was necessary to enable a proper analysis of his breath to be made by means of an approved screening device, contrary to Section 254(5) of the Criminal Code; (emphasis added)

- **October 5, 2012:** A letter enclosing all four Informations is faxed to Mr. Dunn's office by the Crown, indicating the Crown's intention to proceed to trial on the fourth Information;

- **October 12, 2012:** Sixth appearance. The matter is stood down to 1:00 p.m., as Mr. Dunn missed his flight the evening before, but was able to catch a morning flight. When the court reconvenes at 1:00 p.m., Mr. Dunn and Mr. Rivest are present before the court. The Crown advises that there are defects in the first three Informations, and, while the Crown has the option of seeking an amendment, they had decided to lay a new Information to correct the defects. Crown suggests this was done to give reasonable notice to the defence, referencing the letter faxed October 5, 2012. The Crown indicates she will be seeking to proceed to trial on the fourth Information. She elects to proceed by indictment only as a result of expiry of the summary conviction limitation period. The Crown had proceeded summarily on the first three Informations. Mr. Dunn indicates that the fax of October 5, 2012 had been forwarded to him sometime earlier that week. (I would note that as Monday, October 8, 2012 was the Thanksgiving statutory holiday, this would have to have been sometime on the 9th or later.) He indicates that due to his confusion regarding the numbering of the fourth Information, marked as 11-197C, and the reference in the Crown's letter to an intention to proceed on Information 11-0097C, he was unclear until the preceding evening as to the Crown's intentions. He indicates that the defence had been prepared on the basis of the earlier three Informations. As a result he is not prepared to proceed to trial on the fourth Information, before the court for first appearance. In addition, he raises a concern about whether the

laying of the new Information amounted to an abuse of process. An adjournment was sought and granted.

- **October 19, 2012:** Seventh appearance, by agent. The matter is before the court to fix a new date for the anticipated abuse of process application and for trial. The court advises that dates are available in January, but Mr. Dunn is not available. Mr. Dunn is available for the available trial time on February 18, 2012; however, the investigating officer is not available. The matter is set to April 26, 2012 for the preliminary application and for trial;

- **March 25, 2013**: Defence application material filed;

- **April 4, 2013:** Pre-Trial Conference. The court was advised by Mr. Deshaye as agent for Mr. Dunn that the brief has been prepared for the *Charter* application. Crown to file reply by April 19, 2013. Matter set to April 26, 2012 for argument;

- **April 22, 2013:** Crown Book of Authorities filed;

- **April 23, 2013:** Crown Memorandum of Argument filed;

- **April 25, 2013:** Argument on *Charter* application brought forward and adjourned due to Crown failure to file reply materials by prescribed date.

- **June 6, 2013:** Argument on *Charter* application heard by court. Matter adjourned for written decision to be released by June 28, 2013 and set to August 21, 2013 for trial.

[3] It should be noted that while each of the Informations indicates a Whitehorse address for Mr. Rivest, it is my understanding that he is an Alberta resident.

Issues:

[4] The defence has raised three issues set out in his written argument as follows:

> [24] Did the Crown's actions by electing to proceed by indictment in order to circumvent the six-month limitation period averred in section 786(2) of the *Criminal Code* constitute an abuse of process; and a violation of Mr. Rivest's rights, *inter alia*, as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*?
>
> [25] Has Mr. Rivest's right, as guaranteed by section 11(b) of the *Charter*, to be tried within a reasonable period of time been infringed?
>
> [26] If so, is a stay of proceedings warranted in the circumstances?

Abuse of Process:

[5] In *R.* v. *Jewitt,* [1985] 2 S.C.R. 128, the Supreme Court of Canada confirmed that a trial court has discretion to enter a stay of proceedings where there has been an abuse of process. Numerous subsequent decisions out of the Supreme Court of Canada have explored both the meaning of abuse of process and the test to be applied in determining whether a stay of proceedings is warranted (See *R.* v. *O'Connor,* [1995] 4 S.C.R. 411*, Canada (Minister of Citizenship and Immigration)* v. *Tobiass,* [1997] 3 S.C.R. 391, and *R.* v. *Regan,* 2002 SCC 12. Each of these has been considered by the Ontario Court of Appeal in the more recent case of *R.* v. *Zarinchang,* 2010 ONCA 286. At paragraphs 57 and 58, the Court offers the following helpful summary of the applicable principles:

> [57] From the above cases in the Supreme Court, the following principles emerge:
>
> (1) There are two categories of cases that may attract a stay of proceedings. The first category implicates the fairness of an individual's trial resulting from the state misconduct. The second involves a residual category unrelated to the fairness of the trial, but involves state conduct that contravenes fundamental notions of justice, which undermines the integrity of the judicial process.
>
> (2) In considering whether to grant a stay of proceedings under either of the above categories, the following criteria must be satisfied:
>
> (i) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; it must be directed at prospective prejudice, not to redress past prejudice; and
>
> (ii) No other remedy is reasonably capable of removing that prejudice.

> (3) In cases in either of the above categories where there remains some uncertainty as to whether the abuse is sufficiently serious to create the prejudice to warrant a stay, there is a third criterion that the court may consider – the balancing of the interests in granting a stay against society's interest in having a trial on the merits.
>
> [58] Where the residual category is engaged, a court will generally find it necessary to perform the balancing exercise referred to in the third criterion. When a stay is sought for a case on the basis of the residual category, there will not be a concern about continuing prejudice to the applicant by proceeding with the prosecution. Rather, the concern is for the integrity of the justice system.

[6] In determining whether, on the facts of this case, the actions of the Crown amount to an abuse of process justifying a stay of proceedings, the defence relies heavily on the Nova Scotia Court of Appeal decision in *R.* v*. Boutilier* (1995), 147 N.S.R. (2d) 200. That case involved a charge of failing to stop in relation to an accident involving a pedestrian. The original charge alleged an offence contrary to s. 252(1)(b) for failing to stop after striking a vehicle rather than a s. 252(1)(a) for failing to stop after striking another person. The Crown elected to proceed summarily on the original charge, and did not realize the error in the charge until the eve of trial, after expiry of the six month limitation period set out in s. 786(2) for proceeding summarily. A new Information was sworn on the trial date and the Crown elected to proceed by indictment. The defence made application for a stay of proceedings on the basis of an abuse of process.

[7] In deciding that a stay of proceedings was indeed appropriate in the circumstances, Freeman J.A. referenced the power entrusted to the Crown in relation to electing the mode of proceeding for hybrid offences and further noted the differing jeopardy occasioned by an indictable election, before concluding:

> [24] … The circumstances to which the Crown initially applied its criteria for exercising its discretion did not change. It would strike at the integrity of the system if the Crown is permitted to disavow its original election, in the absence of supporting circumstances related to the offence itself, and make a second election which necessarily disregards its own criteria, simply to patch up a drafting mistake in one Information. (The same criteria, applied to the same circumstances, could not yield a conflicting result). It is very clear that the Crown's motives were arbitrary. In my view, this system is too important, and works too well, to expose it to public disrepute in this way.
>
> [25] To permit proceedings by indictment in the circumstances of this case would, in my view, damage the integrity of the system: integrity cannot be slightly violated any more than an eggshell can be slightly broken. It is an absolute concept. Either it is intact or it is not.

[8] A similar result was reached by the Ontario Court of Appeal in the 1986 decision in *R.* v. *Parkin* (1986) 14 O.A.C. 150 in which the Crown had elected to proceed summarily in relation to a charge of sexual assault alleged to have occurred over an eight month period. The Crown subsequently learned that the relevant time period ended July 27th, such that the time between the last possible date of the offence and the swearing of the Information exceeded the six month limitation period. Crown sought to withdraw the Information and present a second Information, upon which they would necessarily be proceeding by way of indictment. The court concluded that "in light of the Crown's own assessment of the gravity of the offence charged" (para. 12), it would be an abuse of process to endorse the Crown's suggested course of action.

[9] Crown contends that *Boutilier* and *Parkin* are only two of a series of conflicting decisions, pointing to the decisions in *R*. v. *Kelly*, 1998 112 O.A.C. 55, *R.* v. *Smith,* 2002 NSCA 148, *R.* v. *Jans* (1990), 108 A.R. 324 (C.A.) and *R*. v. *Walden,* 2006 SKCA 112 as standing for the contrary proposition.

[10] In *Kelly*, the Crown sought to lay a new Information joining two other Informations upon which the Crown had elected to proceed summarily. The Crown elected to proceed summarily on the new Information in error as it fell outside of the prescribed limitation period. The Crown sought to elect to proceed by indictment. The Ontario Court of Appeal rejected the reasoning in *Boutilier* noting:

> At p. 333, it is said that the accused was alleged to have committed a relatively minor offence "not serious enough to justify proceedings by indictment". With respect, this is to misinterpret or misunderstand the Crown's election. That election, to proceed summarily, signified a choice between two means of prosecuting, not a choice between prosecuting by way of indictment and not prosecuting at all. (para. 55)

[11] The court went on to address the differences in jeopardy occasioned by an indictable election, by suggesting that these are more properly accommodated in the sentencing process.

[12] The defence suggests that these cases are largely distinguishable on the basis that they, unlike *Boutilier* and the case at bar, involved situations in which there was no change to the charge itself and the case to be met, only to the Crown's election.

[13] The Crown further submits that Supreme Court of Canada decision in *R*. v. *Dudley*, 2009 SCC 58, has largely resolved these conflicting cases relating to the Crown's right to "re-elect" by finding that "these cases do not ask the right question" (para. 41). The court goes on to set out the following test to be applied:

> I agree with the Court of Appeal that it is not unfair to the accused to permit the Crown to proceed by indictment unless "the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency" (para. 1). On the record as we have it, nothing of the sort may be said to have occurred here. (para. 44)

[14] In my view, this provides helpful direction in examining situations of this nature, focusing the examination, as it does, on the conduct of the Crown and the prejudice to the accused.

[15] In the case at bar, the conduct of the Crown is certainly troubling. I should note that I am using the term “Crown” in the broader institutional sense, including the RCMP, as it is not entirely clear where all of the responsibility should lie for the failure to “get it right”.

[16] In my view, the accused, and indeed the public, have the right to expect the Crown to be diligent in ensuring a clear articulation of the case to be met. It clearly failed to do so in the first three Informations sworn in this case. It failed to correct obvious defects in the original Information, notwithstanding the fact such defects would have been evident from the beginning and the fact that someone had clearly recognized there were problems with the original Information as early as February 21, 2012, as evidenced by the fact two replacement Informations were sworn. Furthermore, the court brought the issue of multiple Informations to the Crown’s attention on two separate occasions, on May 9 and May 18, 2012, receiving assurances from the Crown that the issue would be addressed; yet the Crown failed to do so until a week before the scheduled trial date, more than ten months after the offence date.

[17] Clearly this conduct falls well short of what the public ought to expect from the Crown; however, in my view, it equally falls short of amounting to an abuse of process sufficient to justify a stay of proceedings.

[18] While the conduct of the Crown can be described as careless and sloppy, and conduct which certainly ought not to be encouraged, it is not what one would describe

as so egregious as to "violate the community's sense of fair play and decency". I am unable to attribute any improper motive to the Crown in choosing to act as it did.

[19] I can conclude, however, that Mr. Rivest suffered prejudice as a result of the Crown's conduct. However, I am not satisfied that the nature of the prejudice suffered, is sufficient, again, to "violate the community's sense of fair play and decency". Counsel for Mr. Rivest was in possession of full disclosure and was clearly mindful of the fact that the Crown had erred in framing the Information vis à vis the circumstances of the offence. As a result, the Crown's error was largely a technical one which would not have come as a surprise to the defence once notice was received that the Crown had discovered their error. However, it was an error which led the defence, quite fairly, to conclude that offence could not be proven as charged. The prejudice to the accused flows largely from the Crown's failure to realize the error and take steps to correct it in a timely fashion. The defence was prepared on the basis of the defects in the first three Informations, resulting in time, expense, and travel which ultimately came to naught when the Crown took steps to correct the error, virtually on the eve of trial.

[20] Again, the conduct of the Crown is extremely troubling in this case, but even if I was able to conclude that it amounted to an abuse of process, I would not characterize this as "the clearest of cases" for which there is no other remedy reasonably capable of removing the prejudice occasioned by the misconduct. Firstly, any prejudice flowing to Mr. Rivest as a result of the increased jeopardy from an indictable election is effectively "cured" by the Crown's offer to proceed summarily with Mr. Rivest's consent to waive the limitation period prescribed in s. 786(2). In addition, any prejudice flowing to Mr. Rivest as a result of a change in the case to be met on the eve of trial is effectively

remedied by the granting of an adjournment to allow sufficient time to prepare, a remedy which, effectively, has already been granted through His Honour Judge Faulkner's order adjourning the trial on October 12, 2012. While neither of these remedies address the issue of the costs incurred by Mr. Rivest in relation to both trial preparation on the earlier Informations and for travel to Whitehorse for a trial that did not occur, I am not satisfied that this alone is sufficient to elevate this to "the clearest of cases" justifying a stay of proceedings.

[21] However, there is the remaining question of the impact of the delay caused by the conduct of the Crown which I now turn to in relation to the s. 11(b) application.

Unreasonable Delay:

[22] Mr. Rivest also seeks a stay of proceedings pursuant to s. 24(1) of the *Charter* on the basis of unreasonable delay in breach of his s. 11(b) right. Section 11(b) of the *Charter* states:

> 11. Any person charged with an offence has the right
> …
> (b) to be tried within a reasonable time.

[23] The leading case on this section is *R. v. Morin,* [1992] 1 S.C.R 771. In *Morin,* the Supreme Court of Canada set out the factors that are relevant to a determination of whether there has been a breach of s. 11(b) as follows:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
    (a) inherent time requirements of the case,
    (b) actions of the accused,
    (c) actions of the Crown,
    (d) limits on institutional resources, and
    (e) other reasons for delay; and

4. prejudice to the accused (para. 31).

[24] The burden is on the accused to establish a breach of his *Charter* right, and the determination is fact-specific. The ultimate question is the reasonableness of the overall delay (see e.g. *R. v. Purchase*, 2012 BCSC 208).

Consideration of the s. 11(b) factors

1. *Length of delay*

[25] Although *Morin* set a rough guideline of 8-10 months for provincial/territorial court trials, this is flexible and should be adjusted to reflect the local context. I note that most out-of-custody trial dates here are generally set well below this time frame.

[26] Crown suggests that the decision of the Yukon Supreme Court in *R.* v. *Blais* [1994] Y.J. No. 143 (S.C.) stands for the proposition that a lengthier period of delay in the Yukon ought not to result in a stay of proceedings. In that case, the court determined that a delay of 16 months was insufficient to warrant a stay. However, I would note that *Blais* involved a trial in Supreme Court rather than Territorial Court. As noted in the Supreme Court of Canada decision in *R.* v. *Godin*, 2009 SCC 26, affirming the approach in *Morin*, 14-18 months is the rough guideline for trials in Supreme Court. The delay in *Blais* falls squarely within this guideline.

[27] Applying the rough guideline for trials in provincial/territorial courts as set out in Morin, I would note that it has now been just under 18 months since Mr. Rivest was arrested and about 16 ½ months since the first Information was sworn. By the time the matter goes to trial as currently scheduled, it will have been just under 20 months from the date of arrest and just over 18 months from the date of swearing the first

Information. This is clearly outside the rough guideline set by *Morin* and is an unusual delay for a territorial court trial in this jurisdiction; it therefore bears further scrutiny.

2. Waiver of time periods:

[28] I cannot find any period of time for which the accused has either explicitly or implicitly waived the delay. Although the adjournments were almost exclusively at defence request, as will be discussed further below, I find that the accused and his counsel have for the most part acted diligently in seeking relevant material, obtaining status with the Law Society, and in securing trial and application dates.

[29] As such, I am still considering a period of roughly 18 months between the charge and the trial date in my assessment of the overall delay.

3. *The reasons for the delay:*

(a) Inherent requirements of the case:

[30] Inherent time requirements are meant to recognize the inevitable delay in administering the criminal justice system. They include things such as the complexity of the case, the time required for preparation, and the time required to accomplish such things as the retention of counsel, the conduct of bail hearings and the receipt of disclosure (*R. v. Ghavami*, 2010 BCCA 126, para. 45).

[31] In this case, it appears that Mr. Rivest had secured counsel prior to his first appearance, and that the disclosure package had also been made available prior to the first appearance. The case itself is not complex. However, Mr. Dunn is, like Mr. Rivest, resident in Alberta. He therefore had to obtain permission from the Law Society of Yukon to act in the Yukon. The transcripts suggest that the application process had

been initiated prior to Mr. Rivest's first court appearance on March 7, 2012. However, it appears the Law Society was, for whatever reason, not able to process Mr. Dunn's application until April 25, 2012. I accept that this delay is properly characterized as part of the inherent delay in this matter, and, as such, it does not count against either the Crown or the accused. The three month period of time between February 13, 2012 and May 9, 2012 is therefore inherent.

(b) Actions of the accused:

[32] As noted in *Ghavami,* the actions which count against the accused must be actions within the control of the accused (para. 46). Applications and adjournments must be justified, but only actions that directly contribute to the delay or that constitute a deliberate attempt to delay the proceedings will count against the accused (*R. v. MacDougall*, [1998] 3 S.C.R. 45, at para. 48).

[33] Here, I find that there was some delay occasioned by defence counsel's relatively limited availability. While there was no comparison data filed, in my experience, trial dates in out-of-custody matters are generally available within three to four months in this jurisdiction. This is illustrated in the transcript relating to the October 19, 2012 appearance to fix a new date for trial, in which it is apparent that there are available dates in both January and February.

[34] Notably, at the May 9, 2012 fix date, Mr. Dunn indicated through his agent that, with the exception of October 12, 2012, he was unavailable until March of 2013. The October date was set, and defence conceded before me that I could perhaps count two months of this five month delay against him due to his extremely limited availability.

[35] With the exception of this two month period, I decline to count any of the other adjournments or delays against the accused. The adjournment of the October 12, 2012 trial date was, as noted above, entirely necessary, and at the fix-date of October 19, 2012, although the Court had dates available in January 2013 and the application was ultimately set down in April 2013, defence was available as early as February. The Supreme Court in *R. v. Morin,* 2009 SCC 26 observed that, while defence counsel should be reasonably available and reasonably cooperative, they do not have to hold themselves in a state of perpetual availability (para. 23). In October 2012, unlike in May 2012, Mr. Dunn did have several dates available within a more reasonable four- to six-month time frame.

[36] I also note that, although the trial and any applications ought not to require more than a day of court time, Mr. Dunn does have to travel from Alberta and will necessarily need to set aside more than just a day within his own calendar, making scheduling understandably more difficult. The Crown at one point suggested that Mr. Rivest could have avoided some of the delay by retaining local counsel, but, given that he is resident in Alberta and in deference to his right to secure counsel of choice, his course of action in retaining Mr. Dunn is completely reasonable.

[37] In terms of this defence application and its contribution to any delay, I find that the defence acted reasonably, both in setting down the application, particularly given the conflicting lines of cases cited in relation to the abuse of process argument above, and also in reacting to the Crown's failure to file material in accordance with the court-imposed timeline by requiring a further adjournment (see discussion below). As with the

second trial date, Mr. Dunn made himself reasonably available in securing new dates for this application and for Mr. Rivest's trial.

[38] I therefore find that two months of the delay is attributable to the accused.

(c) Actions of the Crown:

[39] As is the case with the accused's conduct, this part of the test considers the applications and adjournments occasioned by the Crown and within the control of the Crown. Here, there are two adjournments which were required as a result of last minute Crown conduct.

[40] First, was the laying of a third replacement Information a week before the trial date of October 12, 2012. It was submitted, and there is no evidence to the contrary, that this new Information only came to the attention of defence counsel shortly before trial. As was made clear in the appearance on October 12 before Faulkner J., the new Information struck a fatal blow to Mr. Dunn's trial strategy, which was to rely on the particularization of the Information and secure an acquittal when the Crown was unable to prove beyond a reasonable doubt that Mr. Rivest refused, as opposed to failed, the ASD. The obvious remedy was the adjournment that was ultimately granted.

[41] I also find that the Crown is responsible for the adjournment of the April 26, 2013 date that was originally set for this application. Although the accused's application was filed March 25, 2013, and a clear timeline was set and agreed on at the April 4, 2013 Pre-Trial Conference, the Crown failed to respond within it. By the time defence counsel's office received the Crown material on April 23, 2013, he was engaged in

another trial in northern Alberta and would have had virtually no time to review the document before the scheduled date of April 26, 2012.

[42] At the fix-date of October 19, 2012, the Crown had dates and was prepared to proceed before April 26, 2013, however, I find that the late notice in relation to the fourth Information along with the Crown's failure to file a reply to defence counsel's application within the prescribed time limit warrants attributing the roughly 8 months of delay between the October 12, 2012 trial date and the June 6, 2013 hearing date to the Crown. In my view, the Crown also properly bears responsibility for the 2 ½ months between the hearing date and the August 21, 2013 trial date.

(d) Limits on institutional resources:

[43] Institutional delay begins to run when the parties are ready for trial but the system cannot accommodate them (*Morin*, para. 47).

[44] In this case, the Court had dates available earlier than what the parties could accommodate. I find that institutional delay played no significant role in this case.

(e) Other reasons for delay:

[45] One additional type of delay that is relevant to this factor is delay occasioned by the trial judge (*Morin,* para. 59). Here, I have already laid the delay between the April 25, 2013 adjournment and the August 21, 2013 trial date at the feet of the Crown. I should note, however, that the decision to split up the application and trial dates and set them down separately was mine. Given that I am seized, my own availability over the summer became a factor. If part of the four-month delay is properly captured under this

category, as noted in *Morin*, it should certainly not weigh against the accused in the final balancing.

4. Prejudice to the accused:

[46] There are three rights that are protected by s. 11(b): liberty, security of the person, and the ability to make full answer and defence. Prejudice can be inferred from a lengthy delay, and the longer the delay the more likely it is that the inference will be drawn (*Morin,* para 61).

[47] In this case, Mr. Rivest was released on a Promise To Appear and has not experienced any significant deprivation of liberty as a result of these proceedings being prolonged. However, I do consider that he has suffered prejudice with respect to the two other implicated rights.

[48] In terms of security of the person, although there is no evidence that he has suffered inordinate stress or damage to reputation, the fact that he has had unresolved criminal charges hanging over his head for the past 18 months can be inferred to have taken some toll. As well, the financial cost of defending himself has been likely substantially heightened as a result of the last minute adjournments and changes to trial strategy that have been necessitated, especially given that he and his counsel have been required to fly in to Whitehorse on at least one occasion. This has some bearing on the security of his person.

[49] Without knowing what Mr. Rivest's strategy will ultimately be, it clearly cannot be the same as what he was intending to advance at his first trial date. Accordingly, as he now has to begin again in planning his trial strategy, he will almost certainly be prejudiced by the passage of time.

Summary:

[50] Roughly 18 ½ months will have elapsed between the date the original Information was sworn and the date set for trial. I have broken this down as follows:

- Neutral delay – 6 months. This includes the three months between the February 13, 2012 swearing of the original Information and the May 9, 2012 setting of the October 12, 2012 trial date, and three of the five months between May 9 and October 12.

- Delay attributable to the Crown – 10 ½ months. This includes the period between the first two trial dates (October 12, 2012 – April 26, 2013) and the period between the second and third trial dates (April 26, 2013 – August 21, 2013).

- Delay attributable to the accused – 2 months. This represents a portion of the five months between the setting of the first trial date on May 18, 2012 and the date itself.

[51] I have also concluded that the accused has suffered prejudice as a result of this delay.

Balancing:

[52] The Supreme Court of Canada in *Morin* observed that s. 11(b) has a primary and secondary purpose. While the primary purpose is to protect the individual rights of the accused, there is a secondary public interest. Part of the public interest is a societal demand that alleged offenders be brought to trial to be dealt with according to the law (*Morin*, paras. 26-30). Both of these aspects need to be considered and weighed in an overall balancing of the factors set out in *Morin*. It is only if delay is unreasonable within the overall factual context that a s. 11(b) breach is made out and a s. 24(1) remedy becomes available.

[53] In *Ghavami,* the B.C. Court of Appeal spoke about the task of balancing once the reasons for pre-trial delay have been determined:

> 52 In our view, balancing makes sense only if weight is attributed to the causes of delay. Inherent time requirements should receive little if any weight, because they are not attributable to either the state or the accused, and because some delay is inevitable. Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state - Crown, justice system, or judiciary - are responsible for some part of the delay, then the public interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. However, institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action.

[54] The issue in *Ghavami* was how delay occasioned by prosecutorial conduct fits into the balancing of the public and individual interests at stake in a s. 11(b) application. While some Crown conduct falls outside the ambit of s. 11(b) scrutiny as an aspect of core prosecutorial discretion, other decisions are properly considered within this aspect of the inquiry (para. 54). Although the charging decision “[lies] at the core of prosecutorial discretion”, I do not consider that the repeated swearing of replacement Informations is entirely an exercise of this discretion. While it is clearly open to the Crown to correct deficiencies in charges, its repeated failure to get things right is troubling, and, in this case, its scrambling on the eve of trial unnecessarily prejudiced the accused and led to the first adjournment.

[55] The second adjournment, which I have also ascribed to the Crown, is clearly within the realm of consideration on this application. By failing to meet a court-imposed

deadline for filing materials, the Crown occasioned a second adjournment. No reasonable explanation for this failure was advanced in argument.

[56] I conclude that both of these periods of delay should weigh heavily in favour of the accused.

[57] Given this, and given my findings on prejudice, I find that Mr. Rivest's right to be tried within a reasonable time has been breached. Accordingly, I direct a judicial stay of these charges under s. 24(1) of the *Charter*.

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RUDDY T.C.J.